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**Conflict over *Waqf* property in Jerusalem:  
Disputed jurisdictions between civil and *Shari'a*  
courts**

*by Haitam Suleiman*



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# Conflict over *Waqf* property in Jerusalem: Disputed jurisdictions between civil and *Shari'a* courts

by Haitam Suleiman\*

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## Abstract

*Recent revisionist academic legal historians have relocated the Israeli national story within a colonial and postcolonial narrative, and in a global context indigenous groups dispossessed from their communal and ancestral lands are increasingly re-asserting claims to that land through legal and human rights challenges, deploying international human rights law relating to rights to property and minority rights. Waqf property (held in charitable trust for religious purposes) is an important element in Muslim societies, and has been subject to large-scale transfer to Jewish control since the creation of the state of Israel in 1948 ('redeemed' for the Jewish people). The role of successive Absentee Property Laws in this confiscation derives from Ottoman land tenure, as modified during the British League of Nations Mandate over Palestine, and subsequently. The Israeli legal system has, devised and utilised various modalities and mechanisms to systematically confiscate Palestinian land in general and more specifically the waqf, while also re-establishing shari'a courts and replacing the shari'a court of appeal in Jerusalem. Mutawallis (managers of waqf) have to undertake 'forum shopping' for search for the most suitable court (between Israeli civil and shari'a courts and the Palestinian shari'a court) to get and enforce a favourable judgment, but the new structures leave Palestinians with no legal authority over the administration of the waqf system. Recent legal disputes over the status of certain mosques and cemeteries (as waqf properties), and the special situation of waqf property in Jerusalem Old City are examined as sites of Palestinian resistance.*

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## I. Introduction: legal pluralism & disputes over *waqf* property

This article explores the conflict over land in Israel/Palestine, within a context of postcolonial legal pluralism, with particular reference to Islamic property held for religious charitable purposes (the *waqf*). Israel/Palestine inherits several legal traditions, offering often conflicting sources of legitimacy: Islamic, as applied by the Ottoman empire until 1918, and more recently by Jordan in the West Bank and Egypt in Gaza; British colonial, under the League of Nations Mandate (1923-48); and post-1948 Israeli, with borrowings from United States and European jurisdictions. British colonialism's role in building the Israeli state has been re-asserted by Shamir:

*"Too little attention has also been given to the basic fact that the British, aided by all their colonial experience elsewhere, created and installed a functioning state in Palestine: a rather advanced web of administrative apparatuses and governmental departments, a sound infrastructure and, of course, a fully-developed, ready-to-use legal system".<sup>1</sup>*

English-language literature on *waqf* in Israel/Palestine is limited, and relevant legislation and court rulings are often unpublished, or unavailable in English. This article is able to draw upon field research undertaken by a Palestinian Arab living in Israel, Haitam Suleiman, with Arabic, Hebrew and English language competence, and aware of nuances of language, even body language, and cultural background. Interviewees may have sought to mislead, where questions dealt with controversial and sensitive issues, and officials may withhold information, while the field-work was risky and interrupted by the current conflict.

## II. The Revival of *waqf*

*Waqf* [pl. *awqaf*] in Arabic means hold, confinement or prohibition, and in Islamic *shari'a* law is a juridical institution for the reservation of property for religious purposes. A *waqf* is established by a living man or woman (the *waqif* = founder), who holds a certain revenue-producing property and makes the (principal), inalienable in perpetuity, prohibited from sale, gift and inheritance. The property is placed under the stewardship of a fiduciary (*wali* or *mutawalli*) who assures that the revenues pass to the intended beneficiaries (*mustahiqeen*).<sup>2</sup> Under *Shari'a* law, while *sadaqa* (charity) should reach only the poor and needy, *waqf* can be directed to both poor and rich; *Sadaqa* may be owned, sold, or granted, but the *waqf* is perpetual, with no intervention in ownership, and is confined to fixed property, or things that have sustainable reserved revenues. There are three basic kinds of *waqf*. The first, the *Khairiy* or charitable *waqf*, directs property revenues towards philanthropic goals. The second, the *Ahli* or family *waqf*, benefits family members, with the endower choosing what individuals and what lines of descent benefit; administrators are family members, and the revenue-bearing assets

<sup>1</sup> RONEN SHAMIR, *The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine*, Cambridge 2000, at 11.

<sup>2</sup> SIRAJ SAIT & HILARY LIM, *Land, Law and Islam: Property and Human Rights in the Muslim World*, London 2006. See also, MUSTAFA AHMAD ZARGA, *Ahkam al-awqaf, [Awqaf Rulings]*, Dar 'Ammar 1998.



circulated indefinitely.<sup>3</sup> Finally, the *Mushtarak* or joint *waqf*, divided the revenues between philanthropy and family.

Interestingly, given the contested state of *waqf* in Israel, the very first *waqf* was created by a Jewish convert to Islam who bequeathed his wealth to the Prophet for the benefit of the poor and needy. The juridical form of the *waqf* took shape in succeeding centuries and the jurist Abu Yusuf (d. 798) asserted that a *waqf* was valid only if irrevocable and made in perpetuity.<sup>4</sup> Its perpetuity element distinguishes the *waqf* from the trusts and foundations found in Western legal systems, but it apparently influenced the early English trusts during the time of the crusades, when there was much population movement between Europe and the Holy Lands, including the Franciscan Friars. The University of Oxford in its early years may have been influenced by the *waqf*, with the 1264 Statutes of Merton College (significant in the founding of the college system) showing Islamic influences.<sup>5</sup>

*Awqaf* flourished with the establishment of Muslim-ruled states, offering a means of diverting resources from consumption, and investing them in productive assets to provide either usufruct or revenues for future consumption by individuals or groups of individuals.<sup>6</sup> *Awqaf* served many functions. They provided educational institutions with buildings, teaching materials, staff salaries, and scholarships for poor students, derived from the revenues of orchards and rental buildings, and independent of the state. They provided health services, public kitchens, orphanages, environmental protection and animal care. *Awqaf* stimulated economic activity, providing shops at low rent, public water fountains, and accommodation for commercial caravans. A range of public goods now provided by government agencies in the past came through private *waqf*, which have been called the most important and universal economic institution of Islamic society with reflective influence on the tax structure of the state, the redistribution of wealth in society and the urban fabric of Islamic cities.<sup>7</sup> The *waqf* was an urban institution that shaped the civic space of Ottoman cities,<sup>8</sup> while *waqf* property was estimated at over a third of the agricultural land in Turkey, Morocco, Egypt and Syria. In Recent times modern states in the Middle East however nationalized vast *waqf* properties, while new municipal government services increasingly supplanted the *waqf*. Legislation brought *waqf* under greater regulation or absolute prohibition, and contributed to the prevalence of secular law over *shari'a* principles, resulting in the stagnation of *waqf*. The family *waqf* was restricted, and some states forbade new creations, with the stipulations of *waqf* founders no longer treated as 'sacred and inviolable'. The state claimed that the *waqf* was no longer serving its original purposes, and it could administer them better. The eclipse of *waqf* has left a vacuum in the arena of public services; students, the sick, homeless, travellers, the

<sup>3</sup> TIMUR KURAN, The Provision of Public Goods under Islamic Law: Origins, Contributions, and Limitation of the Waqf System, *Law and Society Review*, vol. 35, no. 4 (2001) 841-897, at 856.

<sup>4</sup> PETER C. HENNIGAN, The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Hanafi Legal Discourse, London 2004.

<sup>5</sup> MONICA M. GAUDIOSI, The influence of the Islamic Law of Waqf on the Development of the Trust in England: the Case of Merton College, 136 *University of Pennsylvania Law Review* (1988) 1231-1261.

<sup>6</sup> MONZER KAHE, Financing the Development of Awqaf Property, Seminar Paper, IRTI, Kuala Lumpur, Malaysia, March 2-4, 1998.

<sup>7</sup> FRANCIS EDWARD PETERS, *Jerusalem and Mecca: The Typology of the Holy City in the Near East*, New York 1986.

<sup>8</sup> RICHARD VAN LEEUWEN, *Waqfs and Urban Structures: The Case of Ottoman Damascus*, *Studies in Islamic Law and Society*, vol. 11, Leiden 1999.

poor and prisoners are only some of the vulnerable who have lost the protection of the *waqf*. The *waqf* is, however, showing signs of reinvigoration, with *Awqaf* properties occupying a growing share of the societal wealth of Muslim countries and those with significant Muslim minorities. Since the oil crisis of the 1970s Islamic banking has developed new tools of finance, and *waqf* has emerged as a non-profit 'third' sector, distinct from the profit-based private sector and the official public sector. Its institutional protections are making it again a main actor in the social and economic life of Muslims.<sup>9</sup>

### III. *Waqf* in Palestine/Israel: special status

As the *waqf* in main is a form of property or a land, therefore its legal influence should be attributed to the conflict over the land, 'generally', in the Middle East. The literature indicates that the *waqf* properties as the land in general were influenced by different and various means, mechanisms and law from those who ruled Palestine in the last two centuries. Before one proceeds to discuss the law of *waqf* in Palestine it is necessary to understand first the history of the legal system in Palestine followed by discussing the land laws in Palestine as this will help to comprehend the entire legal issues related to *waqf* law. Palestine is regarded a special case with a different status at all levels. The legal position in Palestine is simultaneously both one of the most complicated and most rare situations. The legal system in Palestine emerged in unsteady circumstances due to the several powers that ruled Palestine through history. The partition of Palestine led to the creation of complex and different law systems in the West Bank, Gaza Strip and Jerusalem in addition to the parts of the country which were occupied in 1948. The legal system in Palestine was based on the principles of the Islamic *shari'a* law until the end of the Ottoman rule in 1917. The British Mandate followed and remodelled the legal system, along with the Ottoman law-making the British introduced the principles of the Anglo-Saxon system, which is based on Common Law. While the West Bank with eastern Jerusalem inclusive was under the rule of the Hashemite Kingdom of Jordan in 1948, and the Jordanian legal system, which is influenced by many other systems prevailed. The Gaza Strip was under the Egyptian administration where the joint legal system of the former British Mandate prevailed. Later the Israeli occupation imposed its military law on the West Bank and the Gaza Strip after the 1967 war and put eastern Jerusalem subject to the local law of the Israeli occupier after annexing it in 1980. After the Oslo Accord, the Palestinian Authority was found and the jurisdiction of the new authority was agreed upon. The Palestinian legislators then started to unifying and harmonizing the diverse legal systems prevailing in the Palestinian territories. Since 1994 unifying legislation has been enacted for both the West Bank and Gaza Strip.<sup>10</sup>

Most *waqf* properties in Israel was expropriated under the Absentee property Law, and it is one of the most sensitive and complicated issues in the Palestinian-Israeli conflict. Israel claims 93 per cent of its territory as public domain for the Jewish faith, and the process has isolated and contained the surviving Arab communities within Israel, while the rest of the Palestinian people have been displaced to peripheral locations (Gaza, the West Bank), which Israel has

<sup>9</sup> MONZER KAHF, Towards the Revival of Awqaf: A Few Fiqhi Issues to Reconsider, Presented at the Harvard Forum on Islamic Finance and Economics, October 1, 1999. See also, SAIT & LIM, *supra* n. 2.

<sup>10</sup> HAITAM SULEIMAN & ROBERT HOME, 'God is an Absentee, too': The Treatment of Waqf (Islamic Trust) Land in Israel/Palestine, *Journal of Legal Pluralism and Unofficial Law*, (41:59; 2009), 49-65.

held under military occupation since 1967 and also has control of most of the land. During the period 1918-48 land dominated the efforts of the British Mandate. Among the first actions of the occupying British were to close the Ottoman land registers, prohibit all land transactions until a new registry was installed, and transfer much jurisdiction in land matters from Islamic *shari'a* courts to new secular land courts. The British colonial regime therefore had occupied the Palestinian legal systems.<sup>11</sup>

The British established a Supreme Muslim Council in 1921, with a president and four members, to manage *Shari'a* affairs in Palestine. Its *waqf* activities from 1921 to 1936 were impressive:<sup>12</sup>

- Twenty-one new mosques and three minarets built, and 313 mosques repaired (notably the *Al Aqsa* mosque in Jerusalem).
- 224 new properties built, and 300 repaired, including shops, houses, and the *waqf* building (originally the Palace Hotel in Jerusalem, after 1948 used as Government offices).
- draining swamps, planting trees on *waqf* lands, and enlarging *waqf* lands by the purchase of about 25,000 dunums.
- maintaining schools and scholarships for Muslim students to universities in Egypt, Syria, and Europe.
- establishing a Moslem orphanage, training midwives.

In 1948 *waqf* land was estimated to comprise a sixth of the country, but estimates are unreliable, and the Israeli government does not disclose (and may not hold) data on the extent of *waqf*. In 1980 the Custodian of Absentee Property estimated that about 70 percent of the land of the state of Israel might potentially have two claimants - an Arab and a Jew holding respectively a British Mandate and an Israeli deed to the same property.<sup>13</sup>

The concept of absentee was recognised in Ottoman law, which distinguished different categories of absenteeism, and absentee property was theoretically held in suspense or trust.<sup>14</sup> After 1948 Israel applied the term to the Palestinians displaced from Israel (usually over relatively short distances, into Arab-controlled territory).<sup>15</sup> The new Israeli state reformulated regulations devised in 1939 by the British for wartime conditions, as the 1949 Emergency Regulations on Property of Absentees. A Custodian of Absentee Property was instituted, similar to the preceding Mandate Custodian of Enemy Property. The first Emergency Regulation (Absentees' Property) Law 1948 was contained in the Absentees Property Law 1950. Absentee land could be restored in only very restricted circumstances: if the absentee could prove that it was 'for fear that the enemies of Israel might cause him or her harm' or 'otherwise

<sup>11</sup> JOHN STRAWSON, Reflections on Edward Said and the Legal Narratives of Palestine: Israeli Settlements and Palestinian Self-determination, Penn State International Law Review vol. 20 (2002) 363-384.

<sup>12</sup> MICHAEL DUMPER, Islam and Israel: Muslim Religious Endowments and the Jewish State, Washington DC 1994.

<sup>13</sup> DUMPER, *supra* n. 12.

<sup>14</sup> FREDERIC M. GOADBY & MOSES J. DOUKHAN, The Land Law of Palestine, Tel Aviv 1935.

<sup>15</sup> SULEIMAN & HOME, *supra* n. 10.



than by reason of fear of military operations'. The APL caused the confiscation of two million dunams and given to the custodian, who later transferred the land to the development authority. After the establishment of Israel in 1948, state-owned lands previously in the possession of British Mandatory Authorities, and the property abandoned by Arab refugees passed into the control of the new Israeli administration. Waqf ownership passed from Muslim hands to the Custodian, who on behalf of the state could convey the properties to Jewish hands, disregarding shari'a law. Israel did not distinguish between waqf property and any other land, and the Custodian of Absentee claimed waqf property on the ground that the Supreme Muslim Council became an 'absentee' because most of its members were refugees. Thus the Custodian was a conduit through which land passed to the Israeli Development Authority, and later the Land Authority, as a means of 'laundering' confiscated Palestinian land. The Absentee Law 1950 prohibited the shari'a court from their rights to supervise the awqaf properties. The Israeli high court held that the custodian was neither a trustee over the 'absent' property or for the original owners of the properties, nor responsible for their management, and the absentee was not entitled to take legal action against the custodian.<sup>16</sup> The five Ottoman tenure types, which were as follows:

- *Mulk land* (fully-owned urban freehold property). The 7 per cent of the land of Israel still in private ownership is mostly former *mulk* land, mostly located within Arab villages.
- *Miri land*. This had heritable use rights, and could revert to the state if not cultivated after three years (*mahlul*), and then be auctioned to anyone prepared to cultivate it. *Miri* land represented most of the cultivable land and, where not forfeited by the refugees of 1948, was mostly acquired by the Israeli state through various means, particularly strict application of the three-year rule. Any land shown by aerial photography as not cultivated for a sufficient period was forfeited, not back to the village but to the state, by means of an official declaration in words: 'I hereby declare that the area specified in the appendix is government property', the appendix being a rough boundary line on the aerial photo. This declaration was sent to the village head and posted on the land (usually left under a stone), or made orally. The onus of proof for any counter-claim then fell to any prior owner, who had 45 days to commission a cadastral survey and lodge an appeal, but many owners would be unaware of the declaration, and few could afford to mount a defence, especially when they had little hope of success in court.<sup>17</sup>
- State land required for public purposes (in Turkish *matruka*, meaning withdrawn) and registered with the state or local authority. This included military bases, roads, forest land and public open spaces within villages.
- Dead land (*mawat*), i.e. uncultivated, unirrigated and vacant land, needing government consent to bring into cultivation. Islamic law defined 'dead land' as sufficiently far from an inhabited place (a distance regarded as in practice a mile and a half) that a human voice could not be heard. *Mawat* included the Negev desert and the 3000 sq.km. of

<sup>16</sup> Court Case of Civil Appeal 58/54 Mahmud Habab v. Custodian of Absentee Property, (1956) 10 PD 912.

<sup>17</sup> SANDY KEDAR, The Legal Transformation of Ethnic Geography: Israel Law and The Palestinian Landholder 1948-1967, New York University Journal of International Law and Politics, vol. 33, no. 4 (2001) 945-949.

mountain and desert east of Hebron, Jerusalem & Nablus. Article 6 of the Mandate made it and *matruka* land available for Jewish settlement.

- *Waqf* land, held in trust for Muslim religious and charitable purposes. This was confiscated by the state of Israel after 1948, when it comprised a sixth of the count.

A significant law in the confiscation of Palestinian lands, including *waqf* land, was another modification of Mandate emergency regulations (a term carefully retained in its title: the Emergency Regulations (Cultivation of Waste Lands) Law, amended in 1951. This law derived legitimacy not only from Mandate law but also the Ottoman land code, which had provided for special commissions to record abandoned villages and reclassify vacant land lying idle and 'exposed to the sun' (*shamsieh*) as state domain. Much of the land abandoned by the Palestinians in 1948 was not recorded in the Ottoman or Mandate land registers, as many did not register their land for fear of tax collectors and military conscription. While much urban property was held freehold (*mulk* in the Ottoman system), agricultural land was classed as *Miri*, in which formal and ultimate ownership was held by the State, and which if uncultivated for three years could be reclaimed by the state. The Palestinians' culture of the sacred *waqf* is reflected in their treatment of *waqf* plots, often olive groves, cultivated by community volunteers, who would afterwards meticulously clean from their clothes traces of the sacred *waqf* soil. The 1951 Law, however, empowered the Ministry of Agriculture to declare lands as 'waste' lands (Article 2) and to take control of 'uncultivated' lands (Article 4). Such land could thus be confiscated without having to confirm the absentee status of owners.

Another important law was the so-called 1965 amendment, described by Israeli scholars as a 'reform' of the *waqf* in Israel: the Absentees' Property (Amendment No. 3) (Release and Use of Endowment Property) Law 1965). In 1956 the Board of Trustees of the Muslim *waqf*, which by then was made up of collaborators appointed by the government, who would sell or exchange land with the ILA unaccountable to the Muslim community, leading to violence within the community, including assassinations. The 1965 amendment represented a further stage in the confiscation of any remaining Muslim *awqaf*. Authorising the transfer of *waqf* property to the Custodian, denying the conditions that were attached when the property was endowed, and ensuring that property confiscated from the *waqf* would not be returned, regardless of whether the *mutawalli* or the beneficiary is 'absentee'. The law empowered the Custodian to pass the property to the Development Authority or to board of trustees, ostensibly to prevent its neglect, but in practice to sell it for development, contradicting the fundamental perpetual characteristic of *waqf* land. The Law freed the remaining *waqf* from restrictions under *shari'a* law, and restricted the political use of funds generated from those *awqaf*. The amendment granted the state a further tool to transfer the remaining *waqf* properties from Muslim hands to the Jewish community through the use of Muslim 'state appointees' to a board of trustees. The board fulfilled the wishes of the government that appointed them and they did not acquire either any independence from the government or gain any credibility from the Muslim community. Section 4 of the 1965 amended law puts all Muslim sacred places at risk, since the custodian was authorised to sell them, and has no obligation to protect them. The effect of a succession of Absentee Property Laws has precluded Muslims from protecting and maintaining their sacred places, many mosques and cemeteries were subsequently transferred by the custodian to the development authority, which sold on to Jewish investment companies,

and in the end many mosques and cemeteries were converted into museums, cafes, restaurants or even synagogues. The remaining mosques which have not been sold are deserted, and cannot be maintained and used by Muslims who are denied access to them.

#### IV. *Waqf* land in Jerusalem: special status

The situation with *waqf* property is particularly complicated in Jerusalem, because of its special status under international law. *Waqf* represents some 90 percent of property within the Old City (both Islamic and Christian).<sup>18</sup> During the Mandate the Palestinians used *waqf* properties as a buffer against the sale of land to the Jews. Jordan continues to exercise its sovereignty and law over *waqf* institutions in Jerusalem through the Ministry of *Waqf* in Amman, and, while Jordanian law became obsolete with the establishment of the Palestinian Authority (PA) in the West Bank and Gaza, it still forms the legal basis for some institutions in Jerusalem where the PA is not allowed to function.<sup>19</sup> Jordanian control allowed the decline of *waqf* until 1967: only 16 new *awqaf* were founded in Jerusalem during the 19 years of Jordanian rule, compared with 90 under the first 23 years of Israeli occupation (1967-1990), giving the *waqf* a central position in Palestinian society.<sup>20</sup> Many Jerusalem residents rent from *waqf* institutions. Since 1967 rents agreed under Jordanian rule are not recognised by Israeli law, and have not increased in line with inflation, resulting in dilapidation of much *waqf* property in the Old City. Israel maintained the sovereignty of Muslim institutions and the *Waqf* in East Jerusalem (including the Old City) remains under the relevant authorities in Jordan. Individual *waqf* property is recorded in the *Shari'a* Court in Jerusalem and in the Department of Islamic *Awaqaf*, but the extent of *waqf* property in the Old City is not publicly available. Cases decided by the *Shari'a* Court in East Jerusalem on rent or tenancy issues could only be enforced by the civil courts, which are Israeli and so not recognised by the *Shari'a* Court. The *mutawalli* of family *waqf* cannot resolve *waqf* property disputes, because a Palestinian court decision cannot be enforced, while they refuse to take action in the Israeli *shari'a* court because this would be recognizing its jurisdiction over Jerusalem. As a result of this 'void in legal authority', the family *waqf* managers and the Administration have had to rely on moral and community pressure to enforce decisions. Investment in property and establishing new *awqaf* were neglected as a result of the uncertainty and the ambiguity, leading to property blight in Jerusalem particularly in the Old City.<sup>21</sup> The Tenancy Protection Act of 1954 provides that a tenant cannot be evicted either for non-payment of rent, alterations, or sub-letting if resident for more than fifteen years. Additionally most leases allow a tenant to sub-let with *mutawalli* having no control over the sub-letting but still responsible for upkeep. Rent increases were linked to the cost of living index, but only for rents charged in Israeli shekels, while most properties in the Old City are charged in Jordanian dinars, tenants can avoid rent increases with support from Israeli courts. Therefore, some landlords had changed rents to Israeli shekels, seen as more stable than Jordanian, but deflation of the Israeli currency devalued these rents, while Israeli law prohibits

<sup>18</sup> SAMER BAGAEEN, Evaluating the Effects of Ownership and Use on the Condition of Property in the Old City of Jerusalem, *Housing Studies*, vol. 21, no. 1 (2006) 135-150.

<sup>19</sup> YITZHAK REITER, *Islamic Institutions in Jerusalem: Palestinian Muslim Administration under Jordanian and Israeli Rule*, The Hague/London/Boston 1997, at 27-28.

<sup>20</sup> YITZHAK REITER, *Islamic Endowments in Jerusalem under British Mandate*, London/Portland 1996.

<sup>21</sup> DUMPER, *supra* n. 12.

lease revisions or eviction of tenants.<sup>22</sup> Commercial and cultural activities could flourish with Palestinians avoiding the full control of Israel, but investment and development were neglected because of legal uncertainties and ambiguities, as the field-work revealed. The Israeli district court issued an initial decision allowing itself the right to review cases related to Islamic *Waqf* property in Jerusalem but with the potential to be applied all over Palestine.

## 1. The battle in courts

In 1951 the Ministry of Religious Affairs and the Custodian agreed that the ministry would be directly responsible for the management of sacred places, despite the fact that they are considered as 'absentee' properties, approved by the government in 1952.<sup>23</sup>

The *Protection of Holy Places Law* 1967 (Article 1) states that:

"The Holy Places shall be protected from destruction and any other violation and from anything likely to violate the freedom of access of the members of different religions to the places sacred to them or their feelings with regard to those places".

This guarantee was inserted to neutralize international public opinion, but there was no clear definition of 'sacred place' in the Israeli legal system. Adjudication is still governed by a 1924 Mandate law, upheld by the Israel Supreme Court, with matters relating to religious rights in the Holy Places (including disputes between denominations of the same religion, and between religions) decided by the government, and not adjudicated in the courts. About a third of Muslim *waqf* property, principally mosques and graveyards still in use, was not expropriated after 1948, but various approaches have been deployed to obtain the rest. More confiscations of mosques and cemeteries are occurring, contrary to Islamic law. In the beginning of the 1990's, the Islamic Movement in Israel started to survey the *waqf* properties, intending to protect and develop them, and to prevent attempts by Israeli authorities to change their status and sell them off through the state-appointed trustees. Among the disputes over *waqf* properties was that involving the Muslim cemetery of Haifa, (*Jamia' al-estiqlal*) used since the Mandate. In 1993 the *shari'a* court in Haifa confirmed an agreement between two *mutawallis* of the in Haifa and an Israeli company regarding a deal to develop the site, but some months later one of the signatory *mutawallis* applied to the *shari'a* court to cancel the agreement, since the same *qadi* Zaki Midlij who permitted the agreement disowned it. The *mutawalli* then applied to the High Court, relying on an additional statement of *qadi* Midlij, in which he claimed he had been coerced under armed threat from the company's lawyer. The police questioned the *qadi*, who was convicted and resigned as a *qadi* of the *shari'a* court of appeal. The two parties agreed to transfer the case to the civil court in Haifa, where it is still pending. The Adalah organisation petitioned the Supreme Court in the name of Muslim religious leaders to demand legal recognition for the Muslim Holy Places in Israel. A special committee was formed in 2000, to investigate the situation of Arab holy sites, with representation from the Ministry of Religious Affairs, the Ministry of National Infrastructures, the Israel Lands Administration, and the

<sup>22</sup> Information from Field-work interviews undertaken by the present writer in 2008.

<sup>23</sup> SHMUEL BERKOVITS, "How dreadful is this Place!" Holiness, Politics, and Justice in Jerusalem and the Holy Places in Israel, Carta Jerusalem 2006.

Regional Committee for Arab Local Councils. The committee prepared a plan for abandoned non-Jewish holy sites, compiling a list of 53 Muslim holy sites and 58 abandoned Muslim cemeteries, but the Ministry of Religious Affairs did not implement the committee's recommendations.

In *Bhmr* 1931/97 the Israeli civil court held that a mosque should be considered as a sacred place only if the property itself is sacred (the use in itself being insufficient). In Islamic law, however, a *shari'a* court *qadi* can confirm the sacred element: mosques and graveyards remained sacred, even without a roof. The *qadi* of the *shari'a* Court of Appeal Ahmed *Natur* issued a *marsoom qadai* (legal decree) attempting a tougher line, legally binding on all *shari'a* *qadis*. With the Muslim *waqf* places, and the sacred specifically, gradually losing their status, with abuse of *waqf* properties increasingly common, has become a routine practice, with attempts to use the *shari'a* courts to release them. The *qadi's marsoom* was for the 'public benefit' of Muslims in accordance with Islamic law, and he criticised the Israeli state for confiscating *awqaf* properties. He proposed procedural steps to protect the remaining *awqaf* from abolition, *Qadi Natour* states that the *shari'a* *qadis* are not allowed to deliver any *fatwa* which may permit the use of sacred *waqf* properties or any other *awqaf*, for other purposes than declared in the *waqfiya*. Even if the *qadi* tries to rely upon *shari'a* judgments, they may violate basic principles. Mosques are sacred even when closed or deserted, 'as long as one prayer was performed there'. The *qadi* cannot issue or confirm agreements on *waqf* property where affecting sale, rent, or substitution. *Shari'a* courts appointing *mutawallis* should call them to account every six months, with reports kept in an official register available to the public (this procedure important as before many *fatwas* and approvals went inadequately documented). The *shari'a* courts should dismiss *mutawalli* who misappropriate their position and made no action to protect the *waqf*. The *shari'a* courts are not allowed to appoint *mutawallis* without permission of the *shari'a* court of appeal, choosing only those who have good character, history and no criminal record. The Israeli Minister of Religious Affairs, however, by letter of 3 June 1996 rejected the *marsoom*, claiming that *qadi Natour* is not authorised to issue it. *Qadi Natour* challenged the minister as improperly intervening in the judicial system, arguing that the *shari'a* Court of Appeal had jurisdiction.

The case of the Beer el-Sabe 'big mosque' first mosque in the Naqab (Negev), it was founded in 1906, Arab Bedouin sheikhs contributing half of the funding. After 1948 the mosque was confiscated and used as a court and prison until 1953, then as a museum until 1991, but has since been neglected and unprotected, surrounded by restaurants and bars, a municipal building and a public garden. In 2005, the Supreme Court of Israel sat to adjudicate on a petition submitted by ADALAH.<sup>24</sup> In 2002, a request was made for the re-opening of the Big Mosque in Beer el-Sabe (Beer Sheva) to allow Muslim residents and visitors of Beer el-Sabe to pray in it. At the time Beer el-Sabe had some 259 synagogues for 180,000 Jewish residents (one for every 700), while the 5,000 Muslims had no mosque, not to mention the 150,000 Muslims in the surrounding Naqab. The petition was submitted by ADALAH on behalf of the Association for Support and Defence of Bedouin Rights in Israel, the Islamic Committee in the Naqab, 23 Palestinian citizens of Israel, against the Municipality of Beer el-Sabe the Development

<sup>24</sup> ADALAH, The Legal Centre for Arab Minority Rights in Israel, available at <http://www.adalah.org/en/content/view/6677>, last accessed 1 August 2015.



Authority, the Ministry of Religious Affairs, and the Minister of Science. ADALAH argued that free access to the mosque was protected by the right to freedom of religion. The Israeli police force claimed that reinstating the mosque would create inter-community conflict, and, the municipality argued, would bring the ownership of all Muslim religious sites into dispute, even the Temple Mount and Jerusalem. ADALAH argued that maintaining the *status quo* would continue discrimination against Muslims, violating the right of freedom of worship. ADALAH added that there was no presence or representation of any Muslims from Beer el-Sabe or elsewhere on the Committee, and that, as it was formed by and constituted of members of various governmental offices, who are essentially a party to the dispute with an interest in maintaining the *status quo*, the Committee's recommendations were neither just nor objective<sup>25</sup>. Justices Procaccia, Hayut and Jubran ordered that the parties review their positions and within sixty days reach an agreement to change the mosque to a cultural and social centre for use by the Muslim community of Beer el-Sabe, *except for the purpose of praying*. In 2009 the Supreme Court upholds the previous decisions to disallowing Muslims to use the building as a mosque. In the case of 2289/81 involving the *waqf Alestiqal* cemetery in Haifa, the Muslim community in Haifa petitioned in the district court to prevent the *mutawallis* transferring the bones of the Muslim dead elsewhere, and to develop the site. The court claimed that it had no jurisdiction, but referred the case to the *shari'a* court, which allowed the transfer, asserting that the sacredness of a cemetery lapses after 36 years of abandonment, contrary to most Islamic scholarship. Similar approaches have been adopted in other cases. In 232/76 (*Shukri v Sharia Court- Bagats*), the court upheld and reiterated the *Alistiqal* judgment. The *qadi* Tawfiq Asaliya in 1969 stated that after 36 years the status of the *Salma* cemetery in Jaffa changed to 'outworn', but he reversed that decision in 1991, now claiming that 'the sacredness of grave-yards is eternal and this entitlement cannot be nullified as it belongs to Allah', so no-one should destroy graves there. The *Ijzim* cemetery raised similar issues recently, with demonstrations on site. In 1949, a Jewish settlement was built on the lands of the Palestinian village *Ijzim*, whose inhabitants fled after the 1948 war. In 2002 Jewish developers bought land there which included a graveyard of Muslim and Christian Palestinians. In 2004, (the '*Al-Aqsa* institution for the development of *waqf* properties) applied to the Israeli Supreme Court to stop construction work because of the destruction of Muslim graves. The appeal relied upon the 2004 fatwa of *qadi* Ahmed Natour, stating that:

*"the sacredness of grave-yards is eternal and no one is permitted to remove it... insulting graves and the cemetery for the purpose of building a residential area as in this case is forbidden.... the landscape of the grave-yard (even though it was not used for long time) is still considered as waqf and it cannot be confiscated, nor it can be used for other purposes"* (translated from Arabic).<sup>26</sup>

The developers disputed that the land was a cemetery, arguing that the grave-yard recognised by the authorities was at some distance, and that local Muslims did not regard it as such, but admitted that graves had been discovered on the site, which the Ministry of Religious Affairs barred from removal. In 2009 the Supreme Court rejected the petition and allowed construction to continue. The Maamano-Allah Graveyard in West Jerusalem has been another recent

<sup>25</sup> ADALAH, *supra* n. 24.

<sup>26</sup> Available at <http://www.iaqsa.com/>, last accessed 10 August 2015.

contested case. Dating from at least the 13th century, with Muslim tradition holding that companions of the Prophet Muhammad are buried there, the cemetery was declared absentee property in 1955 (with no publicity in Arabic as required under Israeli law), and over the next 30 years, the municipality of Jerusalem gradually acquired ownership, with objections being filed but over-ruled. In 2004 the Simon Wiesenthal Centre began constructing a Museum of Tolerance on part of the cemetery, with a much-publicized ground-breaking ceremony attended by California Governor Arnold Schwarzenegger, the Israeli President and Vice Prime Minister, the Mayor of Jerusalem, and dignitaries and guests from around the world. The Centre aims to 'fortify the value of tolerance between peoples and between man to man'. When work uncovered human graves, the Al-Aqsa institution petitioned the Supreme Court for a provisional injunction preventing construction, and the dispute was brought to the shari'a and civil courts, who issued conflicting judgments. In 2009 the Israeli Supreme Court confirmed that three Muslim cemeteries (MaamanoAllah, Ijzim & Alberwa) are confiscated to Jewish developers, against Palestinian objections.

## V. Conclusion

Whilst investigating the reasons for the *waqf's* decline, a great many participants have shared the view that there is a prevalent difficulty with regard to the enforcement of *shari'a* courts' judgments and this has caused a very real problem; as one interviewee (*mutawalli* of *durri waqf* in Jerusalem) observed "if you have a rent problem with a tenant, and you take a legal action against him, the court decision hardly can be enforced." Another example, a conflict of laws exists at least in Jerusalem district, where both the Israeli and Jordanian laws are applied. Moreover, one *shari'a qadi* pointed out "that there is a problem with court jurisdiction. He cited an example, where his *shari'a* court should have decided in disputes on *waqf* cases, however, his decision was not accepted and the case was raised to the civil courts." As a result of the difficulty with regard to jurisdiction and enforcement, there is confusion for the *mutawallis* who want to take legal action to protect the *waqf*. As one *mutawalli* added "you have to search for the proper court, so that you will be able to enforce the court decision. Often you need to choose between *shari'a* court (either the Palestinian or the Israeli) or civil courts (Israeli)."<sup>27</sup>

Furthermore, the results show that Israel through its land policy is still confiscating *waqf* properties, and preventing access to them. Some recent cases emphasises this point (i.e. *Maamanollah & Ijzim* cemeteries). The field-work revealed; contemporary techniques of management were commonly developed to improve the efficiency of collecting revenue, i.e. a family *mutawalli* of a huge *waqf* in Jerusalem is using a highly sophisticated computer program to divide the profits over the beneficiaries. By contrast one *mutawalli* observes "the corruption and maladministration led to conversion of some *awqaf* to privately owned property, this is of course due to the absence of enforcement by the legal system that brings into account *waqf* players who misappropriate their position." The field-work indicates that there is absence of definite figures on the extent of *awqaf* in Israel. The Israeli government is still holding the records which show the extent and quantity of *awqaf* at least inside Israel. The results from previous studies are based on insufficient data. It is noted that there was contradictory results. Moreover, the literature reveals that the historic role of the *waqf* is considered by Israel as a threat to its physical

<sup>27</sup> The present writer interviewed *Mutawalli* (*waqf* manager) in 2008.

integrity. This assertion according to the field-work remains valid despite the physical occupation over the Palestinian community and the completion of its administrative and legal system. The results show that Israel still fully controls the *waqf* properties. There are different degrees of control; Israel controls *waqf* administration, in terms of payments of their salaries and appointment and the incumbents always have to demonstrate their loyalty to the Israeli state. The State has also re-established *shari'a* courts and replaced the *shari'a* court of appeal in Jerusalem. Such a new structure has left the *Muslim qadis* and officials with no legal authority over the administration of the *waqf* system; they were given only an advisory insignificant role. The Ministry for Religious Affairs established a department to be responsible for the Palestinian religious community. Other communities in Israel were given a greater autonomy over the administration of their religious affairs, for instance the Absentee law exempted some of church properties from confiscation as for the Greek Orthodox Patriarchate was not considered an absentee as defined by the legislation, though in fact the patriarchate is located in Jordanian Jerusalem. The Druze were nevertheless given a relative independence over its *waqf* properties, the 1962 Druze Religious Courts Law had authority over personal status and endowment properties.

The main piece of legislation that has influenced the *awqaf* is the Absentee Law 1950 which gave rise to the confiscation of almost all *waqf* properties in Israel. The Third Amendment of the Absentee Property Law in 1965 described as a 'reform' of the *waqf* in Israel, has in fact, effectively implemented the priorities of the Israeli policy and completed its objective, namely, controlling the entire *waqf* system in Israel. The Amendment has freed the remaining *waqf* from the restrictions of *shari'a* law, i.e. sale; also, it restricted the political use of funds generated from those *awqaf*. Furthermore, the amendment granted the state a further tool to transfer the remaining *waqf* properties from Muslim hands to the Jewish community through the use of Muslim 'state's appointees' board of trustees. The results show that due to the 1965 'reform' many mosques and cemeteries were sold contrary to principles of *shari'a* law.

A modern, positivist ideology of law and the state supported the colonists/colonialists in dispossessing the colonised, and trapped the indigenous Palestinians in a world of manipulated bureaucracy. The state of Israel came into existence in 1948 as the inheritor of a body of non-Jewish law derived from Ottoman law, as 'enriched' by British Mandate law. The court may intervene and issue a decision, potentially making all *waqf* property vulnerable to confiscation. Having driven out most of the Palestinians, it then modified the Mandate institution of the Custodian of Enemy Property, designed to hold such property in trust pending the end of hostilities, into the Custodian of Absentee Property, drawing upon the legal concept of 'absentee' in the Ottoman Land Code. The new state already had state and waste land transferred to it by the outgoing Mandate administration, and used its powers against absentee property to confiscate large tracts of land, both *miri* (or cultivated) land, taking over uncultivated or abandoned land under Ottoman provisions. It treated *waqf* land as little different from other absentee property, disregarding the perpetuity element conferred under *shari'a* law, although 'holy' and 'sacred' places were placed under special protection, and there were particular arrangements for the Old City of Jerusalem. For the Palestinians *waqf* property during the Mandate period had been used as a buffer against Jewish land acquisition, but this protection was gradually eroded. Palestinian attempts since the 1990s to revive *waqf* status and protect mosques and cemeteries from confiscation and change of use have generally been

denied in Israeli courts, while *shari'a* court judgments over-ruled. As expressed by the director of *Awqaf* in Jerusalem, petitioning the Israeli court is 'like walking into a dark tunnel. Nobody can tell what is waiting for him at the other end'. While the *waqf* has successfully functioned for long periods under different conditions; its modern decline seems predictable. The legal system in Israel is a fundamental component and its exceedingly overregulated rules alongside with obstacles of enforcement procedures, made any different outcome unfeasible to achieve without retaining *waqf's* autonomy and independence. Beyond doubts, the decline is due to absence of *shari'a* law that can embrace success, development and reform of the *waqf* system.